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HJ SAID BINAAN SDN BHD v. GETRAHOME SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
MOHD NAZLAN GHAZALI J
[COMPANIES WINDING-UP NO: WA-28NCC-685-10-2017]
23 MARCH 2018

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COMPANY LAW: *Winding-up – Petition – Petitioner and debtor company entered into joint project development agreement and formed company – Petitioner to pay sums to debtor company for agreeing to collaborate with petitioner in project – Development project did not materialise – Primary purpose of joint project development agreement not fulfilled – Debtor company refused to refund deposit payment made by petitioner – Petitioner petitioned for winding-up against debtor company for failure to return deposit payment – Whether debtor company able to pay all debts – Whether debtor company ought to be wound up – Companies Act 2016, ss. 465(1)(e) & 466(1)(a)*

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CONTRACT: *Frustration – Change in circumstances – Petitioner and debtor company entered into joint project development agreement and formed company – Petitioner to pay sums to debtor company for agreeing to collaborate with petitioner in project – Development project did not materialise – Primary purpose of joint project development agreement not fulfilled – Petitioner claimed for refund of deposit payment – Whether contract frustrated – Whether debtor company ought to refund payment of deposit made by petitioner – Contracts Act 1950, s. 57*

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The petitioner and the respondent were local companies involved in the development and construction industries. The respondent was selected to be the joint development partner to develop a piece of land owned by Kwasa Development (3) Sdn Bhd ('Kwasa') ('the project'). The respondent then invited the petitioner to jointly develop the project. They entered into a joint project development agreement to develop the project ('the JPDA'). Under the JPDA, (i) the parties formed a company known as Emerald Epitome Sdn Bhd ('Emerald') and proceeded to execute a shareholders agreement ('the SA') which stipulated that the respondent would hold 51% of shares while the respondent, 49%, in Emerald; and (ii) the petitioner must pay the respondent RM2 million for the respondent agreeing to collaborate with the petitioner in the development of the project. The respondent only received RM400,000 from the petitioner. However, Emerald did not enter into any agreement with Kwasa. Since the primary purpose of the JDPA was not fulfilled, the parties did not proceed to implement the said agreement. This led to the petitioner claiming for the refund of the RM400,000. When the respondent refused, the petitioner commenced the present petition for winding-up against the respondent on the primary basis of the failure to return the deposit payment following the termination of the JPDA. Opposing

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the petition, the respondent argued that (i) cl. 3.1(b) of the JPDA imposed on the petitioner the responsibility for the entire costs and expenses of the development for the availability of the finances necessary for the development of the project; (ii) cl. 7.1 of the JPDA provided that the petitioner shall be responsible to capitalise Emerald; and (iii) the reason the petitioner decided to withdraw from the project was its inability to raise financing for the project, not due to the contract being frustrated, and this did not justify the return of the sum of RM400,000 to the petitioner; and (iv) the respondent was not an insolvent company.

Held (allowing winding-up petition; granting winding-up order against respondent):

(1) The petitioner pursued the winding-up of the respondent on the basis of s. 465(1)(e) of the Companies Act 2016 ('the Act') and, as such, relied on the aid of the statutory presumption under s. 466(1)(a). A failure to pay within the stipulated period of 21 days will give rise to the statutory presumption that the company was unable to pay its debts to all its creditors. It is for the respondent, as the debtor company, to demonstrate that it was able to pay all its debts. However, a neglect to pay the debt could be justified if the refusal is due to the debt being a *bona fide* dispute. This is a well-established basis to deny a petition because it represents a direct challenge on the existence of the debt itself. In other words, the key requirement in s. 466(1)(a) of the Act concerning the debt is being attacked. If the challenge is successful, the presumption does not arise since it could not be said that the respondent neglected to pay. (paras 19-21)

(2) Kwasaland Sdn Bhd ('Kwasaland'), which wholly owns Kwasa, had imposed a restriction against any change in shareholding in Emerald or in the respondent. This restriction was not contained in the earlier letter of award. Due to the new conditions restricting the change in the shareholding in Emerald, the petitioner and the respondent, as the shareholders of Emerald, decided not to proceed to execute the development rights agreement ('the DRA'). This meant that the parties could not pursue their respective commitments as set out in the JPDA to cooperate to develop the project because they decided not to execute the DRA with Kwasa. The JPDA between the petitioner and the respondent was well and truly frustrated. The frustration of contract occurred because the new restriction imposed by Kwasaland operated as a supervening element that prevented the petitioner and the respondent from pursuing the development of the project on the terms of the shareholding arrangement between the two, as set out in the JPDA. Section 57 of the Contracts Act 1950 therefore applied. (paras 13, 24, 30 & 31)

(3) The failure to secure financing was irrelevant to the issue of the inability of the parties to pursue the project. They chose not to execute not because financing was a problem, but as they were not willing to depart from the agreed terms of their shareholding arrangement in Emerald, as contained in the JPDA. The financing was a non-issue as it would not have made any difference to the decision of the parties not to proceed with participating in the development of the project. Financing would only be necessary if the parties, *via* Emerald, decided to pursue the project by executing the DRA with Kwasaland. Furthermore, cl. 7.1 of the JPDA clearly provided that the obligation to provide financing of the development of the project must, in any event, be done in accordance with the DRA. It was crystal clear that in the absence of the execution of the DRA, the issue of the need to raise financing did not arise at all. (paras 46 & 47)

(4) Since the parties were no longer pursuing the project and the JPDA ceased to have any further effect as a consequence, there could not be any *bona fide* dispute that the RM400,000, meant for the purposes of the project, ought to be refunded to the petitioner. The refusal of the respondent to return the RM400,000 was entirely without basis. (paras 48 & 62)

(5) The test of commercial solvency requires the immediate availability to pay current liabilities whenever they fall due. It is cash flow solvency that really matters, not balance sheet solvency. The respondent had not satisfactorily shown that it was not insolvent based on its cash flow position. The respondent had also not furnished any evidence of its more recent financial position, not even any unaudited management accounts. This did little to assist the respondent's case. A refusal resulted in non-payment which, in turn, triggered the statutory presumption under s. 466(1)(a) of the Act. A refusal, pure and simple, could not validly found a basis to deny the winding-up petition. (paras 72, 73 & 76)

Case(s) referred to:

Aeon Big (M) Sdn Bhd v. SSM Management Sdn Bhd [2017] 1 LNS 998 HC ***(refd)***

Bakti Dinamik Sdn Bhd v. Bauer (Malaysia) Sdn Bhd [2016] 10 CLJ 247 HC ***(refd)***

BMC Construction Sdn Bhd v. Dataran Rentas Sdn Bhd [2001] 1 CLJ 591 HC ***(refd)***

Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd [1995] 4 CLJ 283 FC ***(refd)***

Calzaturificio Zenith Pty Ltd (in liq) v. NSW Leather & Trading Co Pty Ltd [1970] VR 605 ***(refd)***

Chip Yew Brick Works Sdn Bhd v. Chang Heer Enterprise Sdn Bhd [1988] 2 CLJ 424; [1988] 1 CLJ (Rep) 5 SC ***(refd)***

Davis Contractors Ltd v. Fareham Urban District Council [1956] AC 696 ***(refd)***

Elf Petroleum SE Asia Pte Ltd v. Winelf Petroleum Sdn Bhd [1984] 1 LNS 166 HC ***(refd)***

Goh Yew Chew & Anor v. Soh Kian Tee [1969] 1 LNS 47 FC ***(refd)***

Hijau Bumi Petroleum Sdn Bhd v. Platinum Green Chemicals Sdn Bhd & Ors [2017] 1 LNS 1253 HC ***(refd)***
Hong Leong Bank Bhd v. Tan Siew Nam & Anor [2014] 7 CLJ 293 CA ***(refd)***
KNM Process Systems Sdn Bhd v. Mission Biofuels Sdn Bhd [2013] 9 CLJ 1003 HC ***(refd)***
KSM Insuran v. Ong Ah Ba & Anor [1984] 1 LNS 147 HC ***(refd)***
Lian Keow Sdn Bhd (In Liquidation) & Anor v. Overseas Credit Finance (M) Sdn Bhd & Ors [1988] 1 LNS 44 SC ***(refd)***
Malayan Plant (Pte) Ltd v. Moscow Narodny Bank Ltd [1980] 1 LNS 44 PC ***(refd)***
Morgan Guaranty Trust Co New York v. Lian Seng Properties Sdn Bhd [1991] 1 BLJ 92 HC ***(refd)***
Re Great Britain Mutual Life Assurance Society [1880] 16 Ch D 246 ***(refd)***
Securicor (M) Sdn Bhd v. Universal Cars Sdn Bhd [1984] 1 LNS 124 HC ***(refd)***
Sri Hartamas Dvpt Sdn Bhd v. MBf Finance Bhd [1992] 1 CLJ 637; [1992] 1 CLJ (Rep) 303 SC ***(refd)***
System Communication Engineering Sdn Bhd v. Zabidin Sdn Bhd [1999] 1 LNS 79 HC ***(refd)***
WWTAI Finance Ltd v. IES Energy Holdings Sdn Bhd [2016] 1 LNS 1801 HC ***(refd)***
Yee Seng Plantations Sdn Bhd v. Kerajaan Negeri Terengganu & Ors [2000] 3 CLJ 666 CA ***(refd)***

Legislation referred to:
Companies Act 2016, ss. 465(1)(e), 466(1)(a), (b), (c)
Contracts Act 1950, s. 57(1), (2)

For the petitioner - Kemkumar Lopez; M/s Kamarudin & Partners
For the respondent - Ravi Nekoo; M/s Rohaina & Co

Reported by Najib Tamby

JUDGMENT

Mohd Nazlan Ghazali J:

Introduction

[1] This concerns a petition for the winding up of the respondent (documented in encl. 1) on the primary basis of the failure to return a deposit payment following termination of an agreement between the respondent and the petitioner.

[2] At the conclusion of the hearing, I granted a winding-up order against the respondent, and highlighted the principal grounds for the decision. This judgment contains the full reasons for my decision.

Key Background Facts

[3] Both the petitioner and the respondent are locally incorporated private limited companies involved in the development and construction industry.

[4] It all started when the respondent was selected to be the joint development partner to develop a piece of 6.52 acres of land in Sungai Buloh owned by Kwasa Development (3) Sdn Bhd ("Kwasa Development") ("the project").

[5] The respondent then invited the petitioner to jointly develop the project. They thus entered into a joint project development agreement dated 27 June 2016 to develop the project ("the joint project development agreement").

[6] For this purpose, the parties agreed, pursuant to the joint project development agreement, to form a company, known as Emerald Epitome Sdn Bhd ("Emerald"). In conjunction thereto, the parties then proceeded to execute a shareholders agreement on even date ("the shareholders agreement"). The key term from both agreements included that the respondent would hold 51% of the total issued shares and the petitioner, 49%, in Emerald. Crucially, the shares to be held by the respondent would be beneficially owned by the petitioner.

[7] Pursuant to the joint project development agreement the petitioner must pay the respondent the sum of RM2 million for the respondent agreeing to collaborate with the petitioner in the development of the project. In accordance with the same, the one and only payment which had been received by the respondent from the petitioner was the sum of RM400,000 which was paid within seven days of the execution of the joint project development agreement.

[8] The parties however did not proceed to further implement the joint project development agreement. It is not disputed that Emerald did not enter into any development rights agreement with Kwasa Development but had instead withdrawn from the project. This primary purpose of the joint project development agreement was thus not fulfilled.

[9] This led to the petitioner claiming the refund of the RM400,000 in its solicitors' letter to the respondent dated 21 July 2017. The respondent refused. The petitioner responded by commencing the instant winding-up proceedings. The winding-up notice under ss. 465(1)(e) and 466(1) of the Companies Act 2016 ("the CA") served on the respondent went unheeded. Hence the instant hearing of the petition for the winding up of the respondent company.

Contentions Of Litigants

[10] The petition is opposed by the respondent. The respondent disagreed that the agreements between the parties had become frustrated.

[11] The respondent highlighted the fact that cl. 3.1(b) of the joint project development agreement imposed on the petitioner the responsibility for the entire costs and expenses of the development and for the availability of the finances necessary for the development of the project. Further, cl. 7.1 of the joint project development agreement provided that the petitioner shall be

responsible to capitalise Emerald whether in the form of equity capital, loans overdraft facilities, or otherwise, as shall be required from time to time, and to bear all costs incurred in relation to the development of the project.

[12] The key argument of the respondent is that the reason the petitioner had decided to withdraw from the project was its inability to raise financing for the project through external financing and not due to the contract being frustrated. This basis does not, according to the respondent, justify the return of the sum of RM400,000 to the petitioner.

[13] The petitioner on the other hand asserted that the reason for the withdrawal was quite simply the imposition of new conditions by Kwasaland Sdn Bhd ("Kwasaland") (which wholly owns Kwasa Development) which restricted any change in the shareholding in Emerald or in the respondent company.

[14] The imposition of the new conditions by Kwasaland against any change in the shareholding in Emerald or in the respondent company affected the rights and obligations of both the petitioner and the respondent in the joint project development agreement which led to both the petitioner and the respondent (as the only two shareholders of Emerald) withdrawing from entering into the development rights agreement with Kwasa Development. As there was nothing to be pursued in relation to the contractual arrangement between the respondent and the petitioner in the joint project development agreement and the shareholders agreement, these were rightly frustrated, justifying the return of the RM400,000 to the petitioner.

Evaluation And Findings Of This Court

[15] The principal contention of the respondent against the winding-up petition is twofold. It is claimed that first, there is a *bona fide* dispute over the debt demanded and secondly, it is a solvent company.

[16] I will now examine the issues raised by the respondent in its resistance to the petition and where relevant for present purposes, discuss the responses made thereto by the petitioner. But first the statutory requirements of s. 465(1)(e) of the CA.

The Law – The Debt Must Not Be Bona Fide Disputed On Substantial Ground

[17] It is plain that s. 465(1)(e) of the CA refers to the winding up ground of "the company is unable to pay its debts." Section 466(1) contains the statutory presumption of inability to pay debts and further elaborates on situations where a company is deemed to be unable to pay its debts; first, where the company neglects to pay within 21 days after service of a demand under s. 466(1)(a); secondly, where the execution process post-judgment is returned unsatisfied under s. 466(1)(b); and thirdly, where the court determines the company to be unable to pay its debts taking into account the contingent and prospective liabilities of the company under s. 466(1)(c).

[18] For completeness, s. 466(1) (a) provides as follows:

> **Definition of inability to pay debts.**
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> (1) A company shall be deemed to be unable to pay its debts if-
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> (a) the company is indebted in a sum exceeding the amount as may be prescribed by the Minister and a creditor by assignment or otherwise has served a notice of demand, by himself or his agent, requiring the company to pay the sum due by leaving the notice at the registered office of the company, and the company has for twenty-one days after the service of the demand neglected to pay the sum or to secure or compound for it to the satisfaction of the creditor; ...

[19] In the instant case, the petitioner, based on the notice, is pursuing the winding up of the respondent on the basis of s. 465(1)(e), and as such, relying in aid of the aforesaid statutory presumption under s. 466(1)(a). A failure to pay within the stipulated period of 21 days will give rise to the statutory presumption that the company is unable to pay its debts to all its creditors.

[20] The presumption arising from the neglect to meet the demand confers on the court the jurisdiction to grant a winding-up order on the basis of s. 465(1)(e) of the CA. But the presumption, as most presumptions go, is rebuttable. And it is then for the respondent as the debtor company to demonstrate that it is able to pay all its debts at the material time.

[21] However, a neglect to pay the debt as demanded in the valid winding up notice could be justified if the refusal is due to the debt being *bona fide* disputed. This is a well-established basis to deny a petition because it represents a direct challenge on the existence of the debt itself. In other words, the key requirement in s. 466(1)(a) concerning the debt is being attacked. If the challenge is successful, the presumption does not arise, since it cannot be said that the respondent has neglected to pay.

[22] After all, the demand must relate to a specified debt. As such, a company has not neglected or refused to pay the debt if the debt is disputed on substantial grounds (see *Securicor (M) Sdn Bhd v. Universal Cars Sdn Bhd* [1984] 1 LNS 124; [1985] 1 MLJ 84).

Whether The Relevant Agreements Were Frustrated

[23] The enquiry on the existence or otherwise of any *bona fide* dispute in the petition before me thus turns on the issue whether the joint project development agreement (and consequentially, the shareholders agreement) ceased to be of further effect and that it has been frustrated to the extent that justifies the return of the RM400,000 to the petitioner. I now turn to the facts and evidence made available before this court and the arguments raised by parties.

[24] It is not in dispute that by way of its letter of award dated 23 March 2017, Kwasaland had imposed a restriction against any change in the shareholding in Emerald or in the respondent. This restriction was not contained in the earlier letter of award dated 5 November 2015. The petitioner averred that the restriction was inconsistent with the arrangement encapsulated in the joint project development agreement, which in turn caused the joint project development agreement to be discharged by frustration given that it had become impossible to be performed.

[25] Even though, as highlighted by the respondent, there is not one document made available before this court which states that external financing had been refused as a result of the petitioner having failed to conform with the shareholding requirements of the external financier, it cannot be disputed that the withdrawal by Emerald from the project is evidenced by a letter dated 6 April 2017 from Emerald itself, and addressed to Kwasaland, stating Emerald's decision to withdraw from proceeding to enter into the development rights agreement with Kwasa Development.

[26] The overarching purpose of the joint project development agreement between the litigants herein is for the two to cooperate in Emerald as the joint venture vehicle to participate in the development of the project. The participation was to be effected by the execution of the development rights agreement between Emerald and Kwasa Development. The decision of Emerald not to sign the development rights agreement (because of the new restriction against the change in shareholding in Emerald) inescapably meant that the very purpose of the joint project development agreement could no longer be pursued or achieved. The consequences for the non-execution of the development rights agreement by Emerald is unmistakably plain. The parties herein are no longer pursuing the project.

[27] It is the petitioner's key assertion that the purpose of the joint project development agreement between the petitioner and the respondent has been discharged by frustration because of a change in circumstances after the joint project development agreement was executed, which change is not the fault of either of the contracting parties, but which has nevertheless rendered the joint project development agreement impossible to be performed. The commercial purpose for which the parties executed joint project development agreement has ceased to exist.

[28] The reference by the petitioner to the decision of the Federal Court in the case of *Goh Yew Chew & Anor v. Soh Kian Tee* [1969] 1 LNS 47; [1969] 1 MLJ 138 is apt. The relevant passage reads:

> The doctrine of frustration is relevant when it is alleged that a change of circumstances after the formation of the contract renders it physically or commercially impossible to fulfil the contract. The doctrine is not concerned with initial impossibility to fulfil the contract. The doctrine is

A not concerned with initial impossibility which renders a contract void *ab initio*, as where a party to a contract undertakes to perform an act which, at the time the contract is made, is physically impossible according to existing scientific knowledge and achievement.

[29] In any event, the law on frustration of contract is also set out under
B s. 57(1) and (2) of the Contracts Act 1950, which reads as follows:

57 Agreement to do impossible act

(1) An agreement to do an act impossible in itself is void.

Contract to do act afterwards becoming impossible or unlawful

C (2) A contract to do an act which, after the contract is made, becomes impossible, or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

[30] I do not think it can be doubted that given the fact of the imposition
D (by neither of the petitioner nor the respondent, being the contracting parties to the joint project development agreement) of the new conditions restricting the change in the shareholding in Emerald, the parties herein, both the petitioner and the respondent decided, as shareholders of Emerald, for Emerald not to proceed to execute the development rights agreement. And
E this must mean the parties cannot pursue their respective commitments as set out in the joint project development agreement to cooperate to develop the project because they decided not to execute the development rights agreement with Kwasa Development. The joint project development agreement between the petitioner and the respondent is well and truly
F frustrated.

[31] The frustration of contract occurred because the new restriction imposed by Kwasaland operated as a supervening element that prevented the petitioner and the respondent from pursuing the development of the project on the terms of the shareholding arrangement between the two as set out in
G the joint project development agreement. Section 57 of the Contracts Act 1950 therefore applies.

[32] Under s. 57 there are two types of frustration. The first is an event that makes the contract impossible of performance from the start, and the second is the event of supervening illegality. The instant case concerns the latter
H type.

[33] It is also of interest to observe that the law is clear in not recognising frustration if it is attributed to the party asserting the same. The concept of frustration is essentially concerned with a situation where a contract becomes impossible or illegal to perform because of a supervening act. This act must
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be one which is not in any manner caused any of the parties. Otherwise a party seeking to extricate itself from his own promises as embodied in a validly concluded contract could, to the extent possible in any particular case, orchestrate or concoct what becomes a supervening impossibility that frustrates the contract. Further, as the words in s. 57 make clear, it is not a frustration if the supervening illegality could be prevented by a party to the contract.

[34] This is made abundantly clear by Gopal Sri Ram JCA (as he then was) in *Yee Seng Plantations Sdn Bhd v. Kerajaan Negeri Terengganu & Ors* [2000] 3 CLJ 666 where he said:

> Now, it is well-settled that the doctrine of frustration has no room where there is fault on the part of the party pleading it. Another way of putting it is that self-induced frustration is no frustration. See, *Dato' Yap Peng & Ors v. Public Bank Bhd & Ors* [1997] 4 CLJ 115 (refd) [1997] 3 MLJ 484. The Master of the Rolls dealt with the point in *Ocean Tramp Tankers v. V/O Sovfracht (ibid)* as follows (at p. 165):
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> > The second question is whether the charter-party was frustrated by what took place. The arbitrator has held that it was not. The judge has held that it was. Which is right? One thing that is obvious is that the charterers cannot rely on the fact that the Eugenia was trapped in the canal; for that was their own fault. They were in breach of the war clause in entering it. They cannot rely on a self-induced frustration; see *Maritime National Fish Ltd. v. Ocean Trawlers Ltd.* [1935] AC 524.
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> So too here. The refusal of the Exco to alienate the lands in question was a deliberate act of non-compliance of the consent order by a party to the first action. It was not a supervening event at all. In these circumstances, it is not open to the instant respondents to rely on the doctrine. The doctrine of frustration has absolutely no application whatsoever to the fact pattern that forms the core of this appeal.

[35] The non-signing of the development rights agreement is a plain, direct and specific consequence of the restriction imposed by Kwasaland which entirely changed the contractual arrangement of the parties *vis-a-vis* their shareholding arrangement in Emerald as embodied in the joint project development agreement. The petitioner and the respondent agreed to cooperate to participate in the development of the project on the basis of the shareholding arrangement between them. That arrangement could not be realised given the new restriction. Of course parties could (but did not) decide to abide by the restriction and make appropriate changes to the joint project development agreement. But one party could not agree to do so without the concurrence of the other since they had previously already agreed to the shareholding formula in the joint project development agreement.

[36] Neither the respondent nor the petitioner induced the frustration. The suggestion by the respondent that the petitioner induced the frustration of the joint project development agreement is entirely untenable. Although the respondent referred to the Court of Appeal decision in *Hong Leong Bank Bhd v. Tan Siew Nam & Anor* [2014] 7 CLJ 293; [2014] MLJU 393 which ruled, consistent with *Yee Seng Plantations* which I referred to earlier, the evidence does not support any finding of the frustration having been induced by the petitioner. Far from it.

[37] The respondent referred to the judgment of Lord Reid in *Davis Contractors Ltd v. Fareham Urban District Council* [1956] AC 696 which has stated:

> It appears to me that frustration depends, at least in most cases, not on adding any implied term, but on the true construction of the terms which are in the contract read in light of the nature of the contract and of the relevant surrounding circumstances when the contract was made ...

[38] I have no disagreement with this important ruling, and accept that whether there is frustration in any particular case would be dependent on the true construction of the terms which are in the contract, read in light of the nature of the contract and of the relevant surrounding circumstances when the contract was made.

[39] In fact, it is precisely because I have followed this ruling and made the requisite examination that I arrived at the conclusion diametrically opposite to the submission of the respondent. As such, the issue of frustration need not be separately first tried or adjudicated upon. In my scrutiny of the facts and evidence of this case, it is imperative that the significance of the shareholding related terms as contained in the joint project development agreement be mentioned, for again, it too has a direct bearing on the question of the existence of a *bona fide* dispute.

The Parties' Shareholdings And Entitlements Under The Joint Project Development Agreement Affected By The New Restrictions

[40] So, what is it about the joint project development agreement that the restriction on change in shareholdings could not be accepted by the petitioner and respondent? Clause 6 of the joint project development agreement states the entitlement of the respondent under the same. It is a payment totalling RM2 million by the petitioner to the respondent. The first payment was for RM400,000 which had been made and is now the subject of this action before me. The remainder of the payments had to be made as set out in accordance with milestones linked to the progress of payments for the project under the development rights agreement. These will of course now not happen since Emerald decided not to execute the development rights agreement.

[41] No less importantly, cl. 3.1 clearly provided that the petitioner is the beneficial owner of the entire shares in Emerald, even though 51% of the entire shares in Emerald is stated to be under the name of the respondent, with the other 49% in the name of the petitioner. Clause 5.1 further states that the respondent may at any time be required to transfer to the petitioner 21% of the respondent's stake in Emerald held by the respondent, subject to cl. 10 which required that at least RM1 million had first been paid to the respondent (and the transfer of the remaining 30% stake after full payment of the entitlement of the respondent).

[42] It is not disputed that this transfer clause was also inserted to ensure that the petitioner, whose responsibility was to secure external financing, would be able to demonstrate to the banks that the petitioner is a 70% majority shareholder of Emerald.

[43] As such, in other words, the terms of the joint project development agreement expressly specified that the petitioner is the beneficial owner of the entire shares in Emerald whilst the respondent's entitlement is only to the amount of RM2 million, and not as against any shares therein.

[44] Therefore, the imposition of the restriction against any change in shareholding indisputably directly affected the implementation of the joint project development agreement – by proscribing the respondent from transferring its 51% stake to the petitioner, and preventing the petitioner from first paying the bulk of the full entitlement of RM2 million to the respondent, given that the latter is conditional on the former.

[45] As it turned out, in the instant case, both parties agreed that they could not proceed and abide by the restriction, which meant, I reiterate, the joint project development agreement is frustrated as they as a result refused to procure Emerald execute the development rights agreement. And they therefore chose not to participate in the development of the project.

[46] Further, the failure to secure financing is in my view irrelevant to the issue of the inability of the parties to pursue the project. They chose not to execute not because financing was a problem, but as they were not willing to depart from the agreed terms of their shareholding arrangement in Emerald as contained in the joint project development agreement. The financing was a non-issue as it would not have made any difference to the decision of the parties not to proceed with participating in the development of the project. For in any event, financing would only be necessary if the parties, *via* Emerald, decided to pursue the project by executing the development rights agreement with Kwasa Development.

[47] Furthermore, the joint project development agreement clearly provided, in cl. 7.1 therein, that the obligation to provide financing of the development of the project must in any event be done "in accordance with the development rights agreement." It is thus crystal clear that in the absence of the execution of the development rights agreement, the issue of the need to raise financing does not arise at all.

[48] Since the parties are no longer pursuing the project and the joint project development agreement ceases to have any further effect as a consequence, there cannot be any *bona fide* dispute that the RM400,000 which the petitioner had paid to the respondent pursuant to cl. 6.1(a) of the joint project development agreement as part of the consideration for the said agreement (*via* the provisions on the payment of RM2 million to the respondent), meant for the purposes of the project, ought to be refunded to the petitioner.

[49] The non-pursuit of the project cannot be doubted. In the letter sent by Emerald to Kwasaland dated 6 April 2017 notifying the latter of the withdrawal, the former also sought for the return of the sum of RM500,000 that had been placed with Kwasaland during the tender exercise. Kwasaland had indeed made the payment returning the RM500,000 to Emerald. The non-return of the RM400,000 by the respondent to the petitioner is therefore difficult to fathom, let alone justify.

Absence Of Bona Fide Dispute Manifest

[50] It has been shown in the above discussions that the non-pursuit of the project and of the joint project development agreement between the parties meant that the basis for the retention by the respondent of the RM400,000 intended for its participation in the project wholly disappears. Fundamentally, I cannot appreciate any valid premise to mount a genuine dispute against that conclusion. For there is in truth no *bona fide* dispute, what more on substantial grounds. It does not also qualify as a dispute to invoke the arbitration clause in the joint project development agreement.

[51] In this regard, I must emphasise that a *bona fide* dispute does not automatically arise whenever there are opposing assertions. The issue of whether or not there is a *bona fide* dispute entirely depends on evidence (see *Chip Yew Brick Works Sdn. Bhd. v. Chang Heer Enterprise Sdn Bhd* [1988] 2 CLJ 424; [1988] 1 CLJ (Rep) 5). It has also been said, *albeit* not in identical context, that in order to oppose a winding-up petition, a respondent company must be able to raise a *bona fide* dispute in both a subjective and objective sense, and that it must be honestly believed to exist and must be based on substantial or reasonable grounds (see *BMC Construction Sdn Bhd v. Dataran Rentas Sdn Bhd* [2001] 1 CLJ 591; [2001] 1 MLJ 356).

[52] As such, in challenging the debt, the respondent must be able to convince the court to be satisfied that there is something that should be tried, either before the court itself, or in an action, or by some other proceeding. The Supreme Court in *Morgan Guaranty Trust Co New York v. Lian Seng Properties Sdn Bhd & Anor* [1991] 2 BLJ 92; [1991] 1 MLJ 95 held that the debt must be disputed on substantial grounds, and cited with approval the following part of the judgment of Jessel MR in *Re Great Britain Mutual Life Assurance Society* [1880] 16 Ch D 246:

> ... in my opinion it is not sufficient for the respondents, upon a petition of this kind, to say 'we dispute the claim'. They must bring forward a *prima facie* case which satisfies the court that there is something which ought to be tried, either before the court itself, or in an action, or by some other proceeding.

[53] A true dispute should be in reference not just to differences arising out of a party's refusal to do something but must relate to a controversy over some contestable matters (see the High Court decisions of VC George J, as he then was, in *Elf Petroleum SE Asia Pte Ltd v. Winelf Petroleum Sdn Bhd* [1984] 1 LNS 166; [1986] 1 MLJ 177 and *KSM Insuran Bhd v. Ong Ah Ba & Anor* [1984] 1 LNS 147; [1986] 1 MLJ 237).

[54] In the instant case before me however, I have already shown that evidence, particularly contemporaneous in nature, do not provide the necessary substantiation to support the case of the respondent that the claim for the return of RM400,000 contained in the winding-up notice is *bona fide* disputed either in a subjective or objective sense, nor premised on any substantial or reasonable grounds.

Approbate And Reprobate?

[55] That is not all. For the respondent to refuse to make the refund, and now argue that the failure of the petitioner securing financing was the reason for the non-pursuit of the joint project development agreement and hence the withdrawal from the project, is surprising since the decision to not proceed had been jointly taken by both the petitioner and respondent. This cannot be shown any more clearly than the letter dated 6 April 2017 referred to earlier, from Emerald to Kwasaland on the former's withdrawal from entering into the development rights agreement. The reason is clearly stated to be the restrictions against change in the shareholding of either Emerald or the respondent.

[56] Crucially, the said letter from Emerald was signed by two directors of Emerald; each representing the shareholders of Emerald. Dato' Ir Mah Wan Loong represented the petitioner, and Mohammad Shafiq bin Shamsuddin, the respondent. No less significantly, the same letter was additionally also copied to both the petitioner and the respondent.

[57] The value of contemporaneous documents such as in the form of the said letter of 6 April 2017 cannot be emphasised enough. In the case of *Hijau Bumi Petroleum Sdn Bhd v. Platinum Green Chemicals Sdn Bhd & Ors* [2017] 1 LNS 1253; [2017] 8 AMR 684, I stated thus:

> [44] I am, in this context reminded of the observation by Chang Ming Tat FJ on the importance and value of contemporaneous acts and documents, and the need to test oral testimonies against them, who in the case of *Tindok Besar Estate Sdn Bhd v. Tinjar Co* [1979] 2 MLJ 229, expressed as follows:
>
> > Nevertheless the learned trial judge expressed himself to be completely satisfied with the veracity of the respondent's witnesses and their evidence. He purported to come to certain findings of fact on the oral evidence but did not notice or consider that the respondent's oral evidence openly clashed with its contemporaneous documentary evidence. *For myself, I would with respect feel somewhat safer to refer to and rely on the acts and deeds of a witness which are contemporaneous with the event and to draw the reasonable inferences from them than to believe his subsequent recollection or version of it, particularly if he is a witness with a purpose of his own to serve and if it did not account for the statements in his documents and writings.* Judicial reception of evidence requires that the oral evidence be critically tested against the whole of the other evidence and the circumstances of the case. Plausibility should never be mistaken for veracity ... (emphasis added)

[58] At all material times, the respondent did not object to the withdrawal but instead agreed to it. There was never any objection made by the respondent. All these again show that there is no *bona fide* dispute as to the debt.

[59] An evaluation of the acts and documents contemporaneous with the event, particularly the said letter, when tested against the totality of the affidavit evidence (noting also that the deponent of the affidavit opposing the petition is not the same person who signed the said letter of withdrawal by Emerald as the representative of the respondent), would in my view lead to lend greater credibility to the case of the petitioner. It would, in my view, be too conveniently self-serving and perfunctory for the respondent to now assert that the withdrawal was due simply to the failure to secure financing and entirely disregarded the fact that it was a joint decision and that it was attributed to the restrictions imposed by Kwasaland.

[60] As such, the respondent should rightfully be prevented from now challenging the demand for refund. The respondent should be estopped from taking this contrary position now (see the leading Federal Court decision in *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysia Merchant Bank Bhd* [1995] 4 CLJ 283). It would be inequitable to the petitioner if it were otherwise.

[61] At the same time, the respondent cannot blow hot and cold. He cannot approbate and reprobate. The respondent jointly made the decision to withdraw. But now it is questioning the withdrawal as an excuse to not make the refund. In the case of *Bakti Dinamik Sdn Bhd v. Bauer (Malaysia) Sdn Bhd* [2016] 10 CLJ 247, I stated thus:

> [43] The position taken by the plaintiffs currently may be characterised as one which violated the principle against 'approbating and reprobating'. In the Court of Appeal case of *Visage Continental Sdn Bhd v. Smooth Track Sdn Bhd* [2007] 6 CLJ 570, Richard Malanjum JCA (as his Lordship then was) referred to various authorities and enunciated clearly the rule that a party should not be allowed to approbate and reprobate as it is a practice that is both plainly unconscionable and unfair.

[62] The refusal of the respondent to return the RM400,000 is therefore entirely without basis.

A Judgment Is Unnecessary To Wind Up A Company

[63] The respondent further submitted that the claim by the petitioner is not based on any judgment debt. Again, the law is clear that a winding-up order can be granted without judgment provided there is no *bona fide* dispute over the debt. In *Aeon Big (M) Sdn Bhd v. SSM Management Sdn Bhd* [2017] 1 LNS 998; [2017] 8 AMR 732 I said:

> [29] In this regard, and equally significantly, it is settled law that a creditor is not required to obtain judgment before serving a statutory demand (see the Court of Appeal decision in *Lafarge Concrete (Malaysia) Sdn Bhd v. Gold Trend Builders Sdn Bhd* [2012] 6 MLJ 817). Similarly, in *Maril-Rionebel (M) Sdn Bhd & Anor v. Perdana Merchant Bankers Bhd & Other Appeals* [2001] 3 CLJ 248, Gopal Sri Ram JCA (as he then was) stated as follows:
>
> > But a petition for winding up is not execution. For a winding up petition is not based upon any judgment of a court. Normally, it is based on the inability of a company to pay its debts as and when they fall due. Such inability is normally evidenced by the company's inability to satisfy or compound a notice of demand issued pursuant to s. 218 of the Companies Act. But the issuance of such a notice is not a *sine qua non* for the presentation of a winding up petition. What is needed is compelling evidence of the company's inability to pay its debts as and when they fall due.

[64] It is clear beyond peradventure that the parties were fully aware that the terms on payments to the respondent and shareholding transfers in the joint project development agreement would be incapable of performance if the parties accepted the imposition by Kwasaland of the condition that the shares held by the parties in Emerald cannot be transferred. The parties accordingly withdrew from the project by getting Emerald not pursuing the signing of the development rights agreement. All these manifestly show nothing but the absence of any *bona fide* dispute on the return of the sum of RM400,000 to the petitioner.

[65] The issue is far from being complex. It has been sufficiently shown that the contract, which is the joint project development agreement could not be performed and has thus been frustrated by the new restriction imposed by the Kwasaland. Even without the concept of frustration, it is plain and obvious that the joint project development agreement has ceased to have any further effect. There is thus no valid basis for the respondent to continue holding on to the RM400,000 and refusing its return to the petitioner.

Solvency Of The Respondent

[66] The other main contention of the respondent is that it is not an insolvent company. It submitted that in *KNM Process Systems Sdn Bhd v. Mission Biofuels Sdn Bhd* [2013] 9 CLJ 1003; [2014] 8 MLJ 434, the meaning of the words "inability to pay debt" in the context of the Australian equivalent to our s. 465 had been considered in *Calzaturificio Zenith Pty Ltd (in liq) v. NSW Leather & Trading Co Pty Ltd* [1970] VR 605 where it was held in the latter thus:

> Merely to take a balance sheet which puts opposite book debts and creditor's liabilities as if they were to be equated is in my view, erroneous. It would be necessary to make an appropriate calculation to decide when the creditors had to be paid and when the debts were likely to be received in order to decide whether at any particular moment in time the company was or was not able to pay its debts as they fell due.

[67] Yet, the respondent did what the cases it relied on said not to do. The respondent argued that based on its audited financial statements as at 31 December 2016, the respondent company had receivables, being part of its current assets, in the total sum of RM19,697,716, which far exceeds the sum of RM400,000 claimed by the petitioner.

[68] Although the respondent did not highlight that its total current assets stood at about RM28.6 million and its total current liabilities at about RM23 million, the more pertinent information for present purposes is the items of current assets under fixed deposit with licensed bank of only RM279,411 and cash and bank balances of merely RM7,257. The two items provide the source for ready availability of cash but together amount to less than the debt of RM400,000 demanded by the petitioner, not to mention to pay off its liabilities to the other creditors.

[69] As the passage from the judgment in *Calzaturificio Zenith Pty Ltd* shows, the crucial consideration is whether at any particular moment in time the company is able to pay its debts as they fell due. It is trite law that even though a company may possess of wealth in the form of investments not presently realisable, if the company has no assets available to meet its current liabilities when due, the company is legally commercially insolvent and may be wound up (see the Supreme Court decision in *Sri Hartamas Dvpt Sdn Bhd v. MBf Finance Bhd* [1992] 1 CLJ 637; [1992] 1 CLJ (Rep) 303).

[70] It is settled law that the issue on the inability to pay debt is to be considered in commercial context, which is the neglect to pay current demands regardless of whether the debtor is in possession of assets which, if realised would permit it to discharge its liabilities. The test of commercial insolvency simply means that the respondent company is not able to meet current debts when they fall due (see *System Communication Engineering Sdn Bhd v. Zabidin Sdn Bhd* [1999] 1 LNS 79; [1999] 1 AMR 1187).

[71] This is why it has been said that a company could be both insolvent but wealthy at the same time (see, for example, the Privy Council decision in *Malayan Plant (Pte) Ltd v. Moscow Narodny Bank Ltd* [1980] 1 LNS 44; [1980] 2 MLJ 53 and the Supreme Court decision in *Sri Hartamas Dvpt Sdn Bhd v. MBF Finance Bhd* [1992] 1 CLJ 637; [1992] 1 CLJ (Rep) 303). It is wholly insufficient that the assets might be realisable at some future date after the debts have become due and payable (see the Supreme Court decision in *Lian Keow Sdn Bhd (In Liquidation) & Anor v. Overseas Credit Finance (M) Sdn Bhd & Ors* [1988] 1 LNS 44; [1988] 2 MLJ 449).

[72] In essence, the test of commercial solvency requires immediate availability of assets to pay current liabilities whenever they fall due. And I emphasise that it is cash flow solvency that really matters, not balance sheet solvency.

[73] In the instant case, the respondent has not satisfactorily shown that it is not insolvent based on its cash flow position. In any event, it has also not furnished any evidence of its more recent financial position, not even any unaudited management accounts. This does little to assist the case of the respondent.

[74] For completeness, I must add that even if the respondent could show that it was not insolvent (which it fails to here), there is no justification whatsoever for its refusal to pay the debt claimed by the petitioner.

[75] In this connection, in *WWTAI Finance Ltd v. IES Energy Holdings Sdn Bhd* [2016] 1 LNS 1801; [2016] MLJU 1591, I ruled as follows:

> [90] But even if it were able to exhibit its solvency, it is not open to the Respondent to assert that it is able to pay the debt but chooses not to at the same time. In *Cornhill Insurance Plc. v. Improvement Services Ltd and Others* [1986] 1 WLR 114, Harman J held that where a creditor's debt is clearly established, the creditor has the right to present a winding up petition and obtain relief even though the company was solvent. The solvency of a company would count for nothing if it persists in non-payment or that it is nevertheless not ready, willing and able to meet the demand of the creditor.

A [91] Conversely, the discretion to refuse winding up could be exercised if the respondent debtor is ready, willing and able to meet the demand of the creditor. In the English Court of Appeal decision i*n Re: The Imperial Hydropathic Hotel Company, Blackpool, Ltd* [1882] 23 Ch D 1 where the company was solvent and the creditor accepted the proposal to pay the debt within one month, the Court of Appeal ordered the debt to be paid
B within one month, in default of which "there will be the usual winding-up order" (see also the Court of Appeal decision in *Lafarge Concrete (M) Sdn Bhd v. Gold Trend Builders Sdn Bhd* [2012] 6 MLJ 817).

[92] In my view, the concept of commercial solvency in insolvency laws, and the presumption it creates under Section 218(2) of the CA should not
C be treated as existing or operating in vacuum. It does not and should not concern itself purely with the state of the debtor's financial and cash-flow position. It should rightfully encompass the equally critical issue of the actual fulfilment of the obligation to pay the debt to the creditor.

[93] Thus, even if a debtor company could demonstrate ready availability
D of more than sufficient cash-flow and liquid assets as well as funds capable of paying its debts whenever they fall due, its refusal or unwillingness to actually make the payment available to the creditor, for any reason other than that the debt is *bona fide* disputed on substantial grounds or other valid bases, must still mean that the company fails to rebut the presumption of its insolvency.

E [94] This would tantamount to the company not being commercially solvent and thus being unable to pay its debts for purposes of Section 218(1)(e) and 218(2) of the CA. After all, such refusal or neglect to pay necessarily means the absence of payment "to the reasonable satisfaction of the creditor" within the meaning of Section 218(2)(a)".

F **[76]** A refusal results in non-payment which in turn triggers the statutory presumption under s. 466(1)(a). The question then turns on whether a respondent company/debtor can show it is not insolvent but still refuses to pay. In my view, a refusal, pure and simple, cannot validly found a basis to deny the winding-up petition.

G **[77]** This is the case even if the debtor is commercially solvent. If a company is solvent and indebted to a creditor, a simple refusal to pay ordinarily cannot legitimately prevent the grant of a winding-up order and is unsupportable in principle, constitutes an unwarranted departure from public policy, conflicts with common and business sense logic and certainly
H not tenable under the law.

[78] Otherwise an insolvent company can conveniently ignore a valid notice of demand to pay its debt to the creditor, purely on the basis that the former is not insolvent. Commercial solvency is a relevant consideration; but it by itself and without more, specifically in the absence of a *bona fide* dispute
I on substantial grounds, cannot be the excuse for not paying to the creditor a valid debt.

Conclusion

[79] Accordingly, in view of the foregoing reasons, I find that there is plainly no *bona fide* dispute on the debt of RM400,000 as demanded by the petitioner in its winding-up notice, and that the respondent has also manifestly failed to rebut the presumption of insolvency. I therefore allow the winding-up petition and grant a winding-up order against the respondent.